

SERVED: September 15, 1999

NTSB Order No. EA-4788

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of September, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-15000 and
v.)	SE-15001
)	
JOHN JEROME BASCO and)	
DAVID R. KOCH,)	
)	
Respondents.)	
_____)	

OPINION AND ORDER

Respondents have appealed from the oral initial decision (attached) of Administrative Law Judge William E. Fowler, Jr., issued at the conclusion of a two-day evidentiary hearing held on February 5 and 6, 1998. By that decision, the law judge affirmed all the violations alleged in the Administrator's amended order (complaint) against Respondent Basco, finding that he operated an aircraft in Part 135 service when he was not qualified to do so, and affirmed all but two violations against Respondent Koch,

pilot-in-command (PIC) of the aircraft.¹ The law judge modified the period of suspension of each respondent's airline transport pilot certificate from 90 to 45 days.² For the reasons set forth below, we deny respondents' appeal and affirm the initial decision.

It is undisputed that, on August 14, 1996, Basco Flying Service was to transport a passenger, Glenn Allen Hunt, in Part 135 charter operation from Pottstown, PA to Philadelphia. The aircraft utilized was a Cheyenne II, which required only one pilot in Part 135 operations. (Tr. at 265.) Both pilots participated in the preflight checks. Respondent Basco sat in the left front seat of the aircraft, Respondent Koch sat in the right front seat, and Mr. Hunt sat in the right rear seat.³ The aircraft crashed on takeoff.⁴

¹The Administrator charged Respondent Basco with violating sections 135.87(a) and (b), 135.115(a), 135.293(a) and (b), 135.343, and 91.13(a) of the Federal Aviation Regulations (FARs), 14 C.F.R. Parts 135 and 91. The Administrator charged Respondent Koch with violating sections 135.87(a) and (b), 135.115(a), 135.117(a) and (b), and 91.13(a) of the FARs, 14 C.F.R. Parts 135 and 91. The law judge dismissed the section 135.117(a) and (b) charges.

These regulations are set forth in the appendix.

²The Administrator has not appealed the reduction in sanction.

³At the time of the flight at issue, Respondent Koch was Chief Pilot and Check Airman and Respondent Basco was President and Director of Operations at Basco Flying Service, a Part 135 air charter operation.

⁴There were no fatalities and respondents were not seriously injured. The extent of Mr. Hunt's injuries is an issue in dispute outside this proceeding.

Respondents admit that, between the two of them, Respondent Koch alone was qualified to operate the flight in a commercial operation under Part 135. They maintain that he was both the PIC and the pilot operating the controls during the takeoff roll at the time of the accident, and that he operated the aircraft from the right seat in order to prepare for an upcoming second-in-command check ride. Although Respondent Basco was in the left front seat, they assert that he was merely a passenger for purposes of this flight,⁵ along for the ride and, further, that there is no prohibition against the only pilot operating an aircraft doing so from the right seat. They maintain that if he touched the controls at all, he only did so when it became apparent that they were in an emergency situation. Respondents contend that there was insufficient evidence to support the law judge's conclusion that Respondent Basco operated the aircraft during the aborted flight at issue, at least before the "emergency" occurred.

Our review of the record satisfies us that preponderant evidence exists to support the law judge's finding. Mr. Hunt testified that he had flown on many charter flights, many times with Basco Flying Service, but that this was his first time in the Cheyenne II. On other flights he had been on, the pilot sat

⁵Respondent Basco is a pilot with in excess of 30,000 flight hours, including 6-7,000 hours in turbo-prop aircraft, and qualified to operate the Cheyenne II under Part 91. (Transcript (Tr.) at 380-82.) At the time of the accident, he also was a Chief Pilot with then USAir and, as a USAir pilot, was prohibited from doing other commercial flying. (Tr. at 396.)

in the left front seat. (Tr. at 46.) He stated that, while walking to the aircraft, he heard Respondent Basco say to Respondent Koch, "Do you mind if I take it to Philadelphia?"⁶ (Tr. at 41-42.) Mr. Hunt noticed that Respondent Koch appeared to be explaining things to Respondent Basco and gesturing to the console. (Tr. at 46.) While his view into the cockpit was partially obstructed, Mr. Hunt testified that he nevertheless could see Respondent Basco's hand on the control which was "the lowest one on the console" at takeoff, when the aircraft began to pick up speed. (Tr. at 50-51.) During the takeoff roll, the aircraft started fishtailing, briefly became airborne, and the left wingtip began dragging on the ground. Mr. Hunt testified that he then saw Respondent Koch's hand come down on top of Respondent Basco's hand and push the throttle down, cutting the power.⁷ (Tr. at 52.)

⁶Mr. Hunt also described respondent's statement in the August 22, 1996 letter he wrote in response to FAA Inspector Martin Lynn's request that he submit a written account of his observations about the accident. (Exhibit (Ex.) A-2.)

Respondents claim that prejudicial error occurred when the law judge permitted Mr. Hunt to testify to what he thought the comment meant. We disagree. The judge was free to interpret the statement himself and, further, Respondent Basco had the opportunity to testify to what he meant by the statement. He said that he did not recall saying those exact words, but that he "remembered saying something like that," and was referring to riding in the airplane. (Tr. at 383.)

⁷This is consistent with the statement Mr. Hunt gave to the police on the day of the accident and his August 22, 1996, letter to Inspector Lynn, in that a reasonable conclusion may be reached that, if Respondent Koch's left hand came down onto Respondent Basco's right hand, already on the throttle, Respondent Basco's hand had been on the throttle before that and thus, he had been operating the aircraft. (Exs. A-1 and A-2.)

According to FAA Aviation Safety Inspector Lynn's testimony, Respondent Koch, in an August 19, 1996, telephone conversation, told him that he had been in the right seat and Respondent Basco had manipulated the controls of the aircraft from the left seat.⁸ (Tr. at 164, 167; Ex. A-4, Inspector Lynn's written record of the call.) In a single pilot operation, Inspector Lynn explained, it is "accepted practice" for the PIC to sit in the left seat.⁹ (Tr. at 178.) Further, the FAA checks PICs in the left, not the right, seat. (Tr. at 182.) He also identified a page from the Basco Flying Service Operations Manual which states that "[t]he PIC will occupy the left seat in the cockpit for any flight leg in which he/she is PIC." (Ex. A-5 at 13.)

To the extent there is conflict between respondents' rendition of events and that of the Administrator's witnesses, we will defer to the credibility decision of the law judge, unless that decision is arbitrary or capricious. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986), and cases cited therein. The record, as discussed above, supports the law judge's findings in

⁸Larry Kreider, Assistant Manager at the Allentown, PA FSDO, also testified that Respondent Koch telephoned the FSDO to report the accident and stated that Respondent Basco had been seated in the left seat and operated the aircraft. (Tr. at 226; Ex. A-10.)

⁹Inspector Lynn noted that ease of access to all the controls is an underlying reason for this practice. In the Cheyenne II, the control for the aircraft's pressurization system is on the left side of the aircraft, making it difficult to be reached by someone seated in the right seat. (Tr. at 178-81.) Respondents argue that the short flight from Pottstown to Philadelphia does not require pressurization.

this case.

Regarding respondents' contention they are aided by the "emergency defense," as set forth in FAR section 135.19, which allows the PIC to deviate from the regulations to the extent required to meet an emergency, we do not see how that helps them, given the facts of this case. They claim that Respondent Basco did not operate the aircraft and that, if he touched the throttle, it was only seconds before the aircraft crashed. First, under anyone's account of the situation, he was never the PIC and, therefore, the emergency defense does not apply to him. Further, he states that he never touched the controls.¹⁰ His testimony is inconsistent with a claim that he should be entitled to deviate from the FARs during an emergency. As for Respondent Koch, the emergency he ultimately encountered did not require that he allow an unqualified pilot to operate the aircraft, either before or during the aborted takeoff.

Finally, respondents assert that a suspension of their airman certificates would result in a financial hardship. We have repeatedly expressed the view that such considerations are not a proper basis for modifying an otherwise legitimate sanction." Administrator v. Van Ovost, NTSB Order No. EA-4681, n.9 (1998). Respondents make no showing that the sanction amount is

¹⁰When asked, "Did you touch anything in the cockpit at any time from the time you boarded [un]til the aircraft came to a stop," he replied, "No." (Tr. at 384.) He also stated that his hands were not on any of the flight controls while Respondent Koch was aborting the takeoff. (Tr. at 387-88.)

inconsistent with precedent.¹¹

We have considered all other arguments set forth in respondents' brief and find them unavailing.¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The initial decision is affirmed; and
3. The 45-day suspension of each respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹³

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹¹An aircraft operated in commercial Part 135 service crashed on takeoff while being operated by an unqualified pilot. The implications for aviation safety from such behavior are striking.

¹²Respondents include multitudinous claims of harmful procedural errors occurring both before and during the hearing. We have found no harmful error. The scheduling conflict that prevented their counsel from taking Mr. Hunt's deposition shortly before hearing (a hearing that had twice before been continued, on motion of respondents) appears to have resulted from counsel's failure to timely notice the deposition of the one non-party eyewitness to the accident.

As for respondents' objection to the admission of the police report, claiming it is contrary to Pennsylvania law, we note that State law is not controlling in NTSB proceedings and hearsay is admissible.

¹³For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).

§ 135.87 Carriage of cargo including carry-on baggage.

No person may carry cargo, including carry-on baggage, in or on any aircraft unless-

(a) It is carried in an approved cargo rack, bin, or compartment installed in or on the aircraft;

(b) It is secured by an approved means; or

§ 135.115 Manipulation of controls.

No pilot in command may allow any person to manipulate the flight controls of an aircraft during flight conducted under this part, nor may any person manipulate the controls during such flight unless that person is-

(a) A pilot employed by the certificate holder and qualified in the aircraft; or

§ 135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas-

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when

applicable, instrument approach facilities and procedures;

(6) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of Propulsion, the same manufacturer, and no Significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.

§ 135.343 Crewmember initial and recurrent training requirements.

No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service. This section does not apply to a certificate holder that uses only one pilot in the certificate holder's operations.

§ 135.117 Briefing of passengers before flight.

(a) Before each takeoff each pilot in command of an aircraft carrying passengers shall ensure that all passengers have been orally briefed on—

(1) *Smoking.* Each passenger shall be briefed on when, where, and under what conditions smoking is prohibited (including, but not limited to, any applicable requirements of part 252 of this title). This briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with the lighted passenger information signs (if such signs are required), posted placards, areas designated for safety purposes as no smoking areas, and crewmember instructions with regard to these items. The briefing shall also include a statement (if the aircraft is equipped with a lavatory) that Federal law prohibits: tampering with, disabling, or destroying any smoke detector installed in an aircraft lavatory; smoking in lavatories; and, when applicable, smoking in passenger compartments.

(2) The use of safety belts, including Instructions on how to fasten and unfasten the safety belts. Each passenger shall be briefed on when, where, and under what conditions the safety belt must be fastened about that passenger. This briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with lighted passenger information signs and crewmember instructions concerning the use of safety belts.

(3) The placement of seat backs in an upright position before takeoff and landing;

(4) Location and means for opening the passenger entry door and emergency exits;

(5) Location of survival equipment;

(6) If the flight involves extended overwater operation, ditching procedures and the use of required flotation equipment;

(7) If the flight Involves operations above 12,000 feet MSL, the normal and emergency use of oxygen; and

(8) Location and operation of fire extinguishers.

(b) Before each takeoff the pilot in command shall ensure that each person who may need the assistance of an other person to move expeditiously to an exit if an emergency occurs and that person's attendant, if any, has received a briefing as to the procedures to be followed if an evacuation occurs. This paragraph does not apply to a person who has been given a briefing before a previous leg of a flight in the same aircraft.

§ 91.13 Careless or reckless operation

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.